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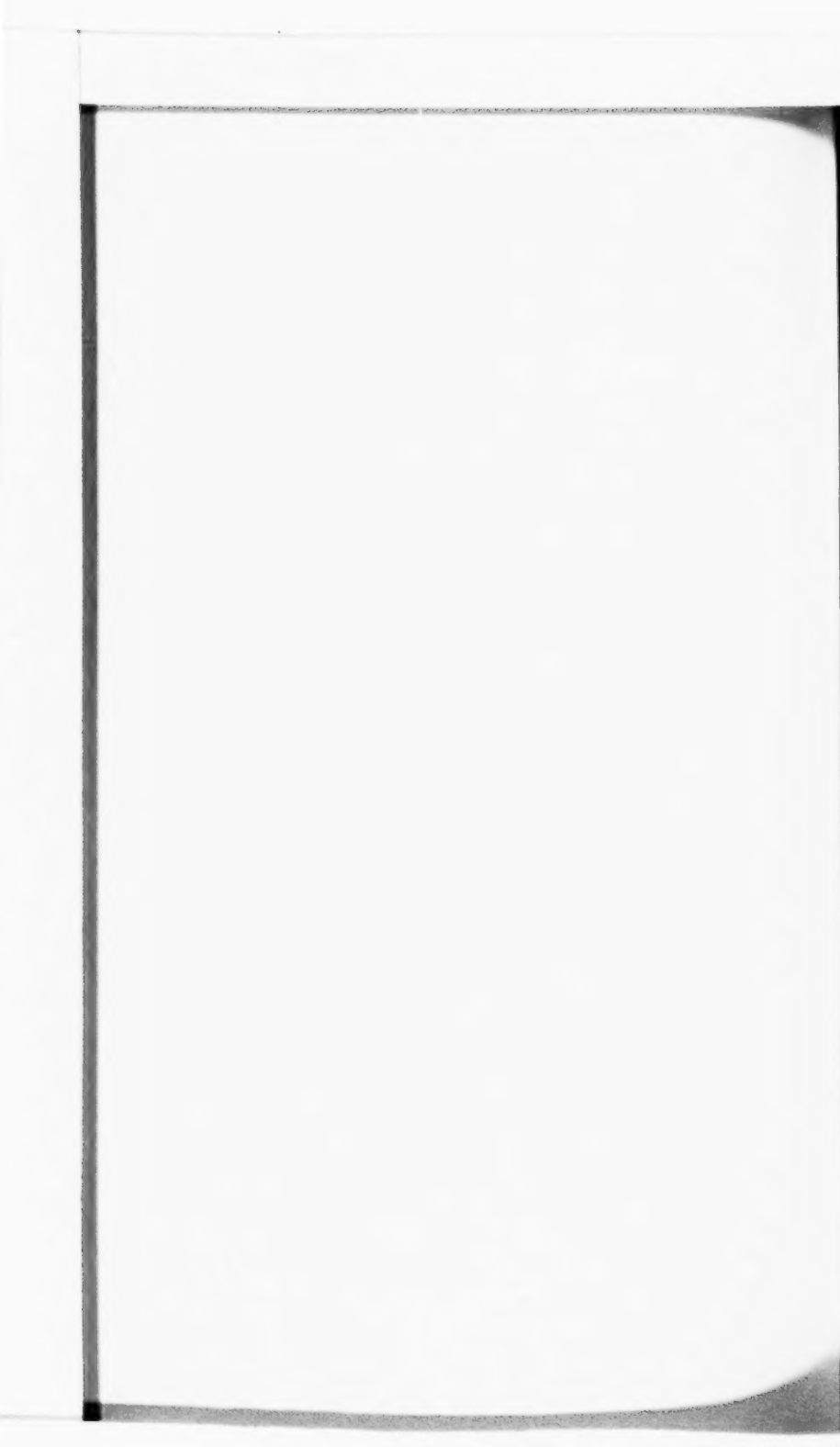
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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. —

UNITED STATES, PETITIONER

v.

THE DISTRICT COURT IN AND FOR THE COUNTY
OF EAGLE AND STATE OF COLORADO

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF COLORADO

The Solicitor General, on behalf of the United States, petitions that a writ of certiorari be granted to review the Judgment of the Supreme Court of the State of Colorado entered in this case on September 15, 1969.

OPINION BELOW

The opinion of the Colorado Supreme Court (Appendix A, *infra*, pp. 19-48) is reported at 458 P. 2d 760.

JURISDICTION

The judgment of the Colorado Supreme Court was entered on September 15, 1969 (Appendix B, *infra*, p. 49). On December 8, 1969, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including February 12, 1970. The

jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).¹

QUESTIONS PRESENTED

1. Whether in enacting 43 U.S.C. 666 Congress intended to consent to suits against the United States for adjudication of its reserved water rights not predicated on State law.

2. Whether the congressional consent to suits against the United States "for adjudication of rights to the use of water of a river system" extends to a supplemental adjudication proceeding in one of some 70 water districts in Colorado which encompasses only a tributary of the Colorado River.

STATUTE INVOLVED

43 U.S.C. 666 (Act of July 10, 1952, 66 Stat. 560) provides:

Suits for adjudication of water rights. (a) Joinder of United States as defendant; costs—

Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead

¹ A discussion relating to the finality of the judgment below for purposes of review by this Court is included at a later point (*infra*, pp. 7-9).

that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

STATEMENT

The United States was joined as a defendant to a supplemental water adjudication proceeding for Water District 37 in the Eagle County District Court in Colorado. Water District 37 is one of 70 water districts in Colorado, and encompasses "all lands lying in the state of Colorado irrigated by water taken from the Eagle river and its tributaries" (Colo. Rev. Stat., 148-13-38 (1963)). The Eagle River is a tributary of the Colorado River.

The United States claims two types of water rights in Water District 37: *appropriative* rights acquired pursuant to State law, and *reserved* rights based on federal law, resulting principally from withdrawals of land from the public domain. Reserved rights have been defined by this Court as the entitlement of the United States to use as much water from sources on lands withdrawn from the public domain as is necessary to fulfill the purposes for which the lands were withdrawn, subject only to water rights vested as of the date of the withdrawal. *Arizona v. California*, 373 U.S. 546, 595-601. Most of the reserved

rights claimed by the United States in Water District 37 are for the White River National Forest, which was withdrawn from the public domain by Presidential Proclamation on August 25, 1905 (34 Stat. 3144).

In response to its joinder as a defendant in the State court proceeding,² the United States moved for dismissal as to it, on the ground of lack of jurisdiction. When that motion was denied by the district court, the United States applied to the Colorado Supreme Court for a writ of prohibition. The first ground of that application was that 43 U.S.C. 666 consents only to a suit wherein the rights of all water users within a river system are before the court, and that a supplemental adjudication proceeding in Water District 37 is not such a suit because Water District 37 does not embrace an entire river system. Moreover, the United States contended that, since the jurisdiction of Colorado district courts is limited by State law to the adjudication of water rights arising

² It should be noted that under Colorado law (at least until this case), the only water rights determined in a supplemental adjudication proceeding are those acquired by appropriation since the last adjudication in that water district (Colo. Rev. Stat. 148-9-7 (1963)). The earliest priority date decreed in such an adjudication must be later than the last priority date decreed in the preceding adjudication (Colo. Rev. Stat., 148-9-13(3) (1963); *Hardesty Reservoir, Canal & Land Co. v. Arkansas Valley Sugar Beet & Irrigated Land Co.*, 85 Colo. 555). The last water adjudication decree in Water District 37 was entered on February 21, 1966. The United States was not a party to that or any prior proceeding relating to Water District 37. The priority dates claimed by the United States for both the rights based on State Law and the reserved rights are earlier than the latest priority decreed in the last adjudication in Water District 37.

under Colorado law (appropriative rights), the district court could not adjudicate water rights of the United States based on reservations of the public domain (App. 22).³

The Colorado Supreme Court in an *en banc* opinion concluded that the United States was subject to the jurisdiction of the district court, and accordingly discharged its rule to show cause. The grounds for its decision were that (1) the adjudication proceeding in Water District 37 is an "adjudication of rights to the use of water of a river system" within the meaning of 43 U.S.C. 666; (2) the United States has consented, by Section 666, to adjudication of its reserved rights; and (3) the Colorado district courts have plenary jurisdiction, independent of State statute, to adjudicate rights of the United States based both on appropriations under State law and on withdrawals from the public domain, and to bring all parties necessary to such an adjudication before the Court (App. 31, 33, 45). The court reserved decision on whether the United States was bound by prior adjudications in Water District 37 to which it was not a party (App. 40).

³ In addition, the United States asserted that, since Colorado law requires that the earliest priority date assigned in a supplemental adjudication be later than the last priority date assigned in the preceding adjudication, neither reserved nor appropriative rights of the United States with earlier priority dates can be determined in a supplemental adjudication proceeding.

The government did not expressly raise the further point that Section 666 does not consent to the adjudication of reserved rights. However, in light of the Colorado Supreme Court's square holding that such rights are within the consent granted by Section 666, and its indication that in its view the reserved rights doctrine is of doubtful validity in Colorado, the question is now properly presented for review.

While the court did not expressly decide that the United States has no reserved water rights in Colorado,⁴ the thrust of its opinion is that the United States has no water rights in Colorado except those arising under State law. The court said the cases cited by the United States in support of its claimed reserved rights (*Arizona v. California*, 373 U.S. 546; *Winters v. United States*, 207 U.S. 564; *United States v. Rio Grande Irrigation Co.*, 174 U.S. 690; and *Federal Power Commission v. Oregon*, 349 U.S. 435) were not determinative (App. 37-40). It suggested that a decision that the United States has reserved rights in Colorado would require the overruling of *Stockman v. Leddy*, 55 Colo. 24, where it had said that the United States, by admitting Colorado into the Union with a provision in its constitution declaring unappropriated waters of streams within its borders to be the property of, and subject to appropriation by, the people of Colorado,⁵ had lost any right to

⁴ The court stated (App. 40): "We are not determining whether the United States has reserved water rights in connection with lands withdrawn subsequent to August 1, 1876, the date of Colorado's admission to the Union; nor, if so, whether these rights have priority over previously adjudicated rights. These questions properly should be decided after the United States presents its specific claims for adjudication and the issues of fact and law are clearly drawn. * * *"

⁵ Article XVI, Section 5, of the Colorado Constitution, provides:

Section 5. Water of streams public property—The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.

assert thereafter water rights in Colorado except those acquired by appropriation pursuant to State law (App. 40).

THIS COURT HAS JURISDICTION

1. As an initial matter, we turn to the question of this Court's jurisdiction. Since the instant case comes from a State court, an express statutory requirement of finality is applicable under 28 U.S.C. 1257. The decision below admittedly did not terminate the entire litigation, for the essence of the Colorado Supreme Court's holding is that the United States is subject to suit, and thus must participate as a party defendant, in the ongoing proceeding in the State district court. Nonetheless, it is our view that the judgment of the Colorado Supreme Court asserting State court jurisdiction over the United States for the adjudication of water rights is final for purposes of review by this Court under 28 U.S.C. 1257(3).

Where the decision below has not conclusively disposed of the whole controversy on the merits, this Court has held that the finality requirement of 28 U.S.C. 1257 is still satisfied if the issue resolved is separable from the merits and is not subject to further review in the state courts. *E.g.*, *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 557-558; *Construction Laborers v. Curry*, 371 U.S. 542, 548-552; *Clark v. Williard*, 292 U.S. 112, 117-119; *Hudson Distributors v. Eli Lilly & Co.*, 377 U.S. 386, 389, n. 4; *Madriga v. Superior Court*, 346 U.S. 556, 557, n. 1; *Pan Ameri-*

can Corp. v. Superior Court, 366 U.S. 656, 657-658.*

More specifically in point is the holding in *Construction Laborers v. Curry*, *supra*. There this Court held that a judgment of the Georgia Supreme Court authorizing a temporary injunction was final for purposes of review because the issue decided—whether Georgia courts had jurisdiction to enter the injunction—was separate from the merits and was not subject to further review in the Georgia courts. In that case the Court stated (371 U.S. at 548):

Respondents would nevertheless have us dismiss this case as beyond our appellate jurisdiction since 28 U.S.C. § 1257 limits our authority to the review of final judgments of state courts and since the Georgia Supreme Court authorized the issuance of only a temporary injunction, thus leaving a permanent order still to be issued after further hearings in the trial court. But we believe our power to review this case rests upon solid ground. The federal question raised by petitioner in the Georgia court, and here, is whether the Georgia courts had power to proceed with and determine this controversy. * * * What we do have here is a judgment of the Georgia court finally and erroneously asserting its jurisdiction to deal with a controversy which is beyond its power and instead is within the exclusive domain of the National Labor Relations Board.

* See also *Rosenblatt v. American Cyanamid Co.*, 86 S. Ct. 1, 15 L. Ed. 2d 39 (opinion by Mr. Justice Goldberg as Circuit Justice).

Similarly, in *Mercantile National Bank v. Langdeau, supra*, this Court held final for jurisdictional purposes a judgment of the Supreme Court of Texas ruling that, where suit was brought in a Texas court against a national bank, a State rather than a federal statute controlled the question of proper venue. This Court observed (371 U.S. at 558):

This is a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action. Moreover, we believe that it serves the policy underlying the requirement of finality in 28 U.S.C. § 1257 to determine now in which state court appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings.

The situation is substantially the same here. The Colorado Supreme Court has ruled, over the objections of the United States, that the Colorado district court has jurisdiction under a federal statute to adjudicate the water rights of the United States, including its reserved rights. Since this issue is clearly separable from the merits of the litigation pending in the State district court (the relative rights and priorities of the claimants of water rights in Water District 37), and is not subject to further review in the Colorado courts, the judgment is final for purposes of this Court's jurisdiction under 28 U.S.C. 1257(3).

REASONS FOR GRANTING THE WRIT

The decision below poses substantial hazards to the effective utilization of federal lands in the West. The net effect of that decision may well be to deprive the United States of valuable water rights for use in connection with the development of the public domain. The United States owns approximately 731,000,000 acres of land in the 17 contiguous western States and Alaska. U.S. Dept. of Interior, *Public Land Statistics*, p. 11 (1966). Water is obviously essential to the utilization and administration of land in these arid and semi-arid States, as well as to a variety of other government projects and programs. In this regard, the United States depends both on water rights acquired pursuant to State law and on reserved rights based on withdrawals from the public domain. Until now the validity of the latter source has scarcely been open to question. See, *e.g.*, *Winters v. United States*, 207 U.S. 564, 577; *Arizona v. California*, 373 U.S. 546, 598, 601.

The decision below threatens the inviolability of the federal government's reserved water rights. Courts in other western States may well be guided by the example set in this regard by the Colorado courts. If, as the decision below portends, the rights of the United States to use the water on its public lands which have been withdrawn for various purposes are to be subjected to the vagaries of inconsistent State laws, the implications for any public-oriented program of conservation and land development are indeed serious. The magnitude of the problem is indicated by the fact that about 443,000,000 acres have

been withdrawn from the public domain for use as Indian reservations, national parks, national forests, national recreation areas, national monuments, etc.⁷ It is not an exaggeration to suggest that the decision below raises serious questions about the nature and scope of the federal government's water rights on all these public lands.

The appropriation system of water law followed by Colorado is prevalent in the western States.⁸ It is fundamental to this system of water law that the rights of users of water from the same source are carefully described as to priorities, amounts and uses in adjudication proceedings. The only statute by which the United States has given its consent to be made a party to such adjudication proceedings is 43 U.S.C. 666. For that reason, the reach of the consent to suit given by the United States in this statute, which has never been definitively construed by this Court on this point, is of great importance. This is particularly so at a time when increasing demands on the Nation's limited water supplies by a rapidly expanding population make it certain that the problems arising under the statute, such as those involved in this litigation, will be recurring ones.

⁷ Wheatley, *Study of Withdrawals and Reservations of Public Domain Lands Prepared for the Public Land Law Review Commission*, App. G, Table G.1 (1968).

⁸ Alaska and eight of the western States, Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah and Wyoming, following the strict appropriation system, or "Colorado doctrine." The other nine States have systems which contain elements of both the appropriation and riparian systems. 5 Powell, *The Law of Real Property*, Sec. 734, pp. 445-446 (1968).

1. The Colorado Supreme Court's decision that the lower State court has jurisdiction to "adjudicate" the reserved water rights of the United States is erroneous and contravenes the intent of Congress in enacting 43 U.S.C. 666. If allowed to stand, the decision below will expose the United States to hazards of litigation regarding its water rights that Congress never contemplated, and as a result may hinder the use of withdrawn public lands for their intended purposes.

Thus, if Section 666 requires the United States to submit its reserved rights to adjudication each time it is made a party to a State court water adjudication proceeding (assuming the joinder would be proper as to rights acquired under State law), it would be burdened with asserting its extensive reserved rights in a multitude of forums or risk losing them by operation of the principle of *res judicata*. See *Green River Adjudication v. United States*, 17 Utah 2d 50.⁹ 43 U.S.C. 666 does not, however, constitute consent by the United States to have its reserved water rights adjudicated under inconsistent State laws. Rather, a reasonable construction of the pertinent statutory language shows that Congress intended the consent to suit pursuant to 43 U.S.C. 666 to extend only to suits for the adjudica-

⁹ A decision of this Court excluding reserved rights from such proceedings, as Congress intended, would eliminate this risk. But such exclusion would not preclude the United States from continuing the practice it has followed in the past of listing and seeking a recognition in those adjudication proceedings to which it is otherwise properly a party of its existing and estimated future requirements for water claimed under the reserved rights doctrine in the area involved.

tion of rights acquired by the United States under State law.¹⁰

The legislative history of the statute supports the conclusion that the consent of the United States does not extend to the adjudication of its reserved rights. See S. Rep. No. 755, 82d Cong., 1st Sess., p. 5 (1951), noting that "Congress has not removed the bar of immunity even in its own courts in suits wherein water rights *acquired under State law* are drawn in question. The bill was introduced for the very purpose of correcting this situation and the evils growing out of such immunity." [Emphasis added.] See also 97 Cong. Rec. 12947-12948 (remarks of Sen. McCarran).

Nothing in the interpretation that the consent given by 43 U.S.C. 666 extends only to suits for the adjudication of the water rights of the United States acquired pursuant to State law is inconsistent with the provision of the statute that "* * * [t]he United States, when a party to any such suit, shall * * * be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty * * *."

¹⁰ Properly viewed, the statutory phrase, "where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise," limits the scope of the statute to rights derived from State law. The only words in that phrase which could include other types of rights, such as reserved rights, are "or otherwise." Application of the rule of *ejusdem generis* leads to the conclusion that those words do not include rights not derived from State law.

If the State courts have jurisdiction to "adjudicate" the reserved rights of the United States, it might be argued that by the quoted language Congress agreed that the United States would be bound by State law in all respects in adjudications to which it is joined under the statute. While we believe such an argument is untenable, if the question is not disposed of now by this Court, it may be presented here again after several years of extended litigation.

The appropriation system of water law, upon which the laws of the western States are based, is essentially different from the concept of reserved water rights. Under Colorado law, to "adjudicate" means essentially to fix the amount and priority date of a water right by determining when, and in what quantity, water was diverted and applied to a beneficial use (Colo. Rev. Stat., 148-9-11, 13 (1963)). Such water rights are subject to loss through abandonment, and thus have characteristics that are incompatible with reserved rights, which arise automatically when lands are withdrawn from the public domain, have priority as of the dates of such withdrawals, and apply to future as well as existing uses. The Colorado Supreme Court's suggestion that the Colorado constitution precludes ownership by the United States of reserved rights in Colorado¹¹ is illustrative of the potential

¹¹ The court did not expressly decide that issue, and left it to the district court to decide whether to recognize the reserved rights claimed by the United States. However, in view

difficulties. But, as we have already noted, the United States unquestionably has the right to use as much water from sources on lands withdrawn from the public domain as is necessary to fulfill the purposes for which the lands were withdrawn, subject only to water rights vested as of the date of withdrawal, and the suggestion thus conflicts with decisions of this Court. *Arizona v. California*, *supra*, 373 U.S. at 595-601; *Winters v. United States*, *supra*, 207 U.S. 564; see also *United States v. Ahtanum Irrigation District*, 236 F. 2d 321 (C.A. 9); *Burley v. United States*, 179 Fed. 1, 12-13 (C.A. 9).¹²

of the court's statement that a determination that the United States has reserved rights in Colorado would require the overruling of its prior decision in *Stockman v. Leddy*, *supra*, the result in the district court is a foregone conclusion. The district court is not going to overrule a decision of the Colorado Supreme Court in order to hold that the United States has water rights which are not recognized under Colorado law. And whether the United States has reserved rights in Colorado does not turn on any facts which must be found by the district court. The Colorado Supreme Court had before it all the facts necessary to decide the question (*i.e.*, the withdrawal order), and its refusal to do so merely procrastinates.

¹² The fact that Colorado was admitted into the Union prior to the date of the withdrawal here involved, with a provision in its constitution, which the Colorado Supreme Court, in *Stockman v. Leddy*, *supra*, construed to be an assertion of ownership of all unappropriated waters within its borders, is inconsequential. By passing the enabling act providing for Colorado statehood Congress intended only to authorize statehood, not to give up any of its rights with respect to the public domain (see Act of March 3, 1875, 18 Stat. 474).

In sum, if the consent of 43 U.S.C. 666 extends to adjudication of the reserved water rights of the United States, the way is open for the Colorado courts and the courts of the other western States to attempt to "adjudicate" those rights out of existence (see App. 24, 28, 43). Congress could not have intended that, for such a construction would effectively convert Section 666 from a statute merely consenting to suit to one effectively disposing of valuable property rights of the United States. To do this surely requires a clearer expression of congressional intent than is found in the words or background of Section 666. See *Utah Power & Light Co. v. United States*, 243 U.S. 389, 404; *United States v. Union Pacific R. Co.*, 353 U.S. 112, 116.

2. Similarly, the court below erred in holding that the United States may be joined under 43 U.S.C. 666 in a State court proceeding for the adjudication of water rights in one of Colorado's 70 water districts. The proceeding relating to Water District 37 is not one "for the adjudication of rights to the use of water of a river system or other source" within the meaning of Section 666. The courts have in general required that all parties claiming rights to the use of water of a river system or other source be before the court, and that the suit be one for an *inter sese* determination of all claimed rights. In *Dugan v. Rank*, 372 U.S. 609, 618, this Court spoke of "a *general* adjudication of 'all of the rights of various owners on a given stream.'" And in *Miller v. Jennings*, 243 F. 2d 157, 159 (C.A. 5), the court said:

The United States has not given its consent to be joined as a defendant in every suit involv-

ing water rights. It may be made a party only in suits "for the adjudication of rights to the use of water of a river system or other source." There can be an adjudication of rights with respect to the upper Rio Grande only in a proceeding where all persons who have rights are before the tribunal. * * * ¹³

Assuming here that the proceeding in Water District 37 is for an *inter sese* adjudication of all water rights claimed in Water District 37, and that the district court can bring all necessary parties before it, the question remains whether Water District 37 includes a "river system" within the meaning of the statute. We believe it does not. Water District 37 is only one of 70 water districts in Colorado (see note 15, *infra*). And the United States has been joined in similar proceedings in Water Districts 36, 51 and 52 in Colorado,¹⁴ as well as in other States, including Utah, Idaho, New Mexico and Washington. More such suits can be expected to follow if the Colorado Supreme Court's decision is allowed to stand. Certainly Congress did not intend the United States to be burdened with the defense of innumerable suits to adjudicate rights as to only small portions of recogniz-

¹³ See also the opinion of the court of appeals, *sub nom.* *State v. Rank*, 293 F. 2d 340, 346-348 (C.A. 9), which was affirmed in *Dugan v. Rank*, *supra*; *State of Nevada v. United States*, 279 F. 2d 699, 701 (C.A. 9); *City of China v. Superior Court of Orange Co.*, 255 Cal. App. 2d 747.

¹⁴ One of the intervenors in the instant proceeding, Central Colorado Water Conservancy District, stated in its brief that it is seeking to join the United States under 43 U.S.C. 666 to supplemental adjudication proceedings in Water Districts 7, 8, 9 and 23.

able river systems. Since the United States has water rights throughout entire river systems, such as the Colorado River, it is more likely to be adversely affected by piecemeal adjudications than private parties whose interests are not so widespread. Congress obviously had this in mind when it enacted 43 U.S.C. 666, and that provision should be construed accordingly.¹⁵

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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EDMUND B. CLARK,
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Attorneys.

FEBRUARY 1970.

¹⁵ On June 7, 1969, the Water Right Determination and Administration Act became effective in Colorado. The Act amends Colo. Rev. Stat. 148-21-1 *et seq.* (1963) by consolidating the 70 water districts into seven water divisions, each designed to include an entire river drainage basin. Water District 37 will be within Division 5, which includes the Colorado River and its tributaries, except the Gunnison River. The Act governs adjudication proceedings initiated after its effective date, but appears to give parties to actions pending at that time the option of proceeding under the new Act. However, since the Colorado Supreme Court found the Act to be immaterial to its decision (App. 22-23), it is not discussed in detail here. At all events, enactment of this statute does not detract from the importance of the question presented here, because it does not affect the problem of piecemeal adjudications in other western States.

APPENDIX A

No. 23819

(Filed in the Supreme Court of the State of Colorado,
September 15, 1969, Richard D. Turelli)

THE UNITED STATES OF AMERICA, PETITIONER

v.

THE DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE
AND STATE OF COLORADO AND THE JUDGE THEREOF,
THE HONORABLE HAROLD A. GRANT, RESPONDENTS
THE COLORADO RIVER WATER CONSERVATION DISTRICT,
CITY AND COUNTY OF DENVER, ACTING BY AND
THROUGH ITS BOARD OF WATER COMMISSIONERS,
CENTRAL COLORADO WATER CONSERVANCY DISTRICT,
AND THE NEW JERSEY ZINC COMPANY, INTERVENORS

ORIGINAL PROCEEDING

En Banc—Rule discharged

Clyde O. Martz, Assistant Attorney General; Shiro Kashiwa, Assistant Attorney General; Lawrence M. Henry, United States Attorney; James L. Treece, United States Attorney; Warwick Downing II, Assistant United States Attorney; Roger P. Marquis, Attorney, Department of Justice; James W. Moorman, Attorney, Department of Justice; David Osborne, Attorney, Department of Justice; Attorneys for Petitioner,

Delaney and Balcomb, Kenneth Balcomb, Respondent, District Court and Judge thereof, and the Intervenor, The Colorado River Water Conservation Dis-

trict; George L. Zoellner, Glenn G. Saunders, Intervenor, City and County of Denver, acting by and through its Board of Water Commissioners; Miller and Ruyle, David J. Miller, Robert A. Ruyle, Alvin L. Steinmark, Intervenor, Central Colorado Water Conservancy District; Dawson, Nagel, Sherman & Howard, Don H. Sherwood, Raphael J. Moses, Intervenor, New Jersey Zinc Company; Attorneys for Respondents.

Mr. Justice Groves delivered the opinion of the Court.

This is an original proceeding in this court wherein the United States has asked for a writ prohibiting the district court from asserting jurisdiction over it in a supplemental water adjudication under C.R.S. 1963, 148-9-7. We issued a rule to show cause why the relief requested should not be granted.

The proceeding is in Water District 37 of the State of Colorado, which embraces the Eagle River and its tributaries. The Eagle River is a tributary of the Colorado River and is non-navigable. There have been a number of previous adjudications in this water district. The decree in the original adjudication was entered eighty years ago and the last one was entered on February 21, 1966. The United States was not a party in any of these earlier proceedings.

The current proceedings were commenced by the Colorado River Water Conservancy District and it sought to make the United States a party under 43 U.S.C. § 666 (known as the McCarran Amendment) which reads in part as follows:

“(a) *Joinder of United States as Defendant; Costs.* Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears

that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

"(b) *Service of Summons.* Summons or other process in any such suit shall be served upon the Attorney General or his designated representative."

The United States moved the district court for dismissal as to it by reason of lack of jurisdiction. This motion was denied by the Honorable William H. Luby, the judge of the court, who has since retired. We have concluded that the district court has jurisdiction over the United States in these proceedings and that the motion was properly denied.

The propositions asserted by the United States are based upon the solid foundation that: (1) the United States cannot be subjected to the jurisdiction of any court without the consent of Congress; and (2) the only statute adopted by the Congress consenting that the United States may be made a party to a water adjudication is the McCarran Amendment. *Dalehite v. United States*, 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427; *United States v. Sherwood*, 312 U.S. 584, 61 S. Ct. 767, 85 L. Ed. 1058; *United States v. Shaw*, 309

U.S. 495, 60 S. Ct. 659, 84 L. Ed. 888; *United States v. Clarke*, 33 U.S. (8 Pet.) 436, 8 L. Ed. 1001. The Government's propositions are as follows:

(1) The McCarran Amendment can be used only with respect to a general adjudication of a river system in which all rights of all users are before the court; and the present proceeding does not involve (a) a general adjudication, (b) an entire river system, nor (c) all water users in the district.

(2) The United States has unadjudicated rights antedating the last adjudicative decree and the district court cannot give priorities to these rights prior to the date of the last adjudication.

(3) The district court has jurisdiction only to adjudicate rights arising out of Colorado law and the United States claims rights arising otherwise.

The following are considered as the "appropriation" states with respect to water adjudication: Alaska, Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, Utah, Washington and Wyoming. With the exception of Colorado all of the appropriation states have a state-wide system of adjudicating priorities or issuing permits for the use of water. Until 1969 Colorado throughout its history has been divided into water districts and adjudicated priorities have been determined within each district. In 1969 the General Assembly of Colorado adopted Senate Bill 81 amending C.R.S. 1963, 148-21-1 *et seq.* which consolidates the 70 water districts of the state into seven divisions, each of which embraces an entire river drainage area within the state. The water adjudication here involved was commenced prior to the adoption of this amend-

ment. There may be some question (which we do not decide) as to whether any further proceedings in the district court will be under the statutes existing before or after this amendment. However, we regard this as immaterial to the jurisdictional question presented. Except as expressly stated otherwise, our comments with respect to Colorado water laws will be with respect to those in existence prior to the 1969 amendment.

As the Government points out, priorities to the use of water are established by decrees of our district courts in the several water districts. Under our statutes there can be an original adjudication culminating in a decree fixing these priorities. Thereafter there can be a supplemental adjudication to establish priorities to the use of water not decreed in the original proceedings. There is no limit to the number of successive supplementary proceedings that may be had. The earliest priority granted in any supplemental adjudication must be later than the last priority established by the next preceding adjudication. *Hardesty Co. v. Arkansas Valley C*, 85 Colo. 555, 277 P. 763. Those appropriating water within the water district involved who were not served personally or by mail with notice of the proceedings are barred from attacking a decree after the lapse of two years. Those outside the water district may bring an action to adjust priority rights as between different districts within four years from the time of rendition of a decree having an effect thereon. C.R.S. 1963, 148-9-16 and 17. In adoption of the McCarran Act in Colorado, prior to the Amendment in 1952, there had been not only original adjudications but supplementary adjudications.

CONGRESSIONAL INTENT

We address ourselves first to the question as to whether it was the intent of Congress that the "adjudication of rights" set forth in the McCarran Amendment includes water adjudications in Colorado. As a preface to this consideration it should be mentioned at the outset—as is later a subject of this opinion—that the United States can obtain in a supplementary water adjudication in Colorado an adequate judicial determination of its rights to the use of water and of the relative priorities of those rights to other water rights.

Water in any area is a vital commodity. A great part of the agricultural lands in the appropriation states can be productive only with the use of water for irrigation. Each state has control of the use and priority of use of water, not only for irrigation, but for domestic, municipal and industrial purposes.

The trend of Congressional legislation has been to require the United States to be in the position of any other claimant to water rights. The Desert Land Act of 1877 made all non-appropriated waters from non-navigable sources upon the public lands "free for the appropriation and use of the public for irrigation, mining and manufacturing purposes." 43 U.S.C. § 321.

"The fair construction of the provision now under review is that Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named. . . . If it be conceded that in the absence of federal legislation the state would be powerless to affect the riparian rights of the United States or its grant-

ees, still, the authority of Congress to vest such power in the state, and that it has done so by the legislation to which we have referred, cannot be doubted." *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 55 S. Ct. 725, 79 L. Ed. 1356.

A part of the Reclamation Act in effect since 1902 reads:

"Vested rights and State laws unaffected: Nothing [in this chapter] shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions [of this chapter], shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or any landowner, appropriator, or user of water in, to or from any interstate stream or the waters thereof." 43 U.S.C. § 383.

The McCarran Amendment was adopted during the second session of the 82nd Congress in 1952. Its language was taken from S. 18, which was introduced in the first session of that Congress in 1951. On April 25, 1951 a member of the Denver Bar testified at a committee hearing as to the nature of water adjudications in Colorado (pages 27 and 28 of Hearings Before A Sub-committee Of The Committee On The Judiciary, United States Senate Eighty-Second Congress, First Session, On S. 18, A Bill To Authorize Suits Against The United States To Adjudicate And Administer Water Rights). He explained how water rights of the City of Denver have been adjudicated in

at least seven districts. This brought clearly to the committee's attention the characteristics of the Colorado system as distinct from those of other states.

The report of the Senate Judiciary Committee, prepared as a result of these hearings, after quoting from *Ickes v. Fox*, 300 U.S. 82, 57 S. Ct. 412, 81 L. Ed. 525, stated:

"It is therefore settled that in the arid Western States the law of appropriation is the law governing the right to acquire, use, administer and protect the public water as provided in each such State.

"It is most clear that where water rights have been adjudicated by a court and its final decree entered, or where such rights are in the course of adjudication by a court, the court adjudicating or having adjudicated such rights is the court possessing the jurisdiction to enter its orders and decrees with respect thereto and thereafter to enforce the same by appropriate proceedings. In the administration of and the adjudication of water rights under State laws the State courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, and by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights. Accordingly all water users on the stream, in practically every case, are interested and necessary parties to any court proceedings. It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a State court, such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the State courts. Unless Congress has removed such immunity by statutory

enactment, the bar of immunity from suit still remains and any judgment or decree of the State court is ineffective as to the water right held by the United States. Congress has not removed the bar of immunity even in its own courts in suits wherein water rights acquired under State law are drawn in question. The bill (S. 18) was introduced for the very purpose of correcting this situation and the evils growing out of such immunity." Senate Calendar No. 711, Report No. 755, September 17, 1951.

H.R. 7289 was a House appropriation bill in the second session of the 82nd Congress. After original action by the House of Representatives, the United States Senate added to it the McCarran Amendment. The bill as so amended came before the House in July 1952. Congressman Rooney of New York moved to strike the amendment and read a communication addressed to him by the Quartermaster General of the United States' Marine Corps, a portion of which stated:

"The effect of such legislation to give a blanket waiver by the United States of its immunity from suit in actions of this kind, opens the way for piecemeal adjudications of water rights in the various State courts, with the United States compelled to defend itself in a multiplicity of actions." Congressional Record—House—July 4, 1952, p. 9445.

Following Mr. Rooney's remarks his motion to strike the amendment lost with all four of Colorado's Congressmen voting "Nay."

Many river systems originate around the Continental Divide in Colorado, collect a substantial part of their flow in Colorado, provide water for the irrigation of Colorado lands and Colorado's domestic, municipal and industrial uses—as adjudicated by our district courts—and flow into Colorado's seven neighbor-

ing states. Some of these rivers are the South Platte, Arkansas, Rio Grande, San Juan, Colorado, White and Yampa, flowing from Colorado to Wyoming, Nebraska, Kansas, Oklahoma, New Mexico, Arizona and Utah.

Our situation with respect to water rights has been that priorities are decreed under state laws, but any water rights of the United States in Colorado remain mysterious, largely unknown, uncatalogued and unrelated to decreed water rights. This creates an undesirable, impractical and chaotic situation. It was to remedy this situation and similar ones in other states that caused Congress to adopt the McCarran Amendment.

The foregoing is only a portion of the history and record which leads us to the conclusion that Congress intended to include the water adjudicative procedure of Colorado among the suits in which sovereign immunity of the United States would be waived. See *In re Greenriver Drainage Area*, 147 F. Supp. 127, and Vol. 1 of the Study of Development, Management and Use of Water Resources on the Public Lands Prepared for the Public Land Law Review Commission, pp. 189-195.

II

A GENERAL ADJUDICATION

The Government argues that the McCarran Amendment relates only to a "general adjudication" and that a supplementary adjudication is not a "general adjudication." The term "general adjudication" is not used in the statute—rather there we find "adjudication of rights." However, the attorneys for the United States point to the use of the term "general adjudication" in *Dugan v. Rank*, 372 U.S. 609, 83 S. Ct.

999, 10 L. Ed. 2d 15. More thorough treatment of the facts and question presented is contained in the decision of the United States Court of Appeals reviewed in *Dugan, sub nom. State v. Rank*, 293 F. 2d 340. This was an action brought by some, but not all, of the users of water of the San Joaquin River in California to enjoin the United States and officials of the Bureau of Reclamation from storing and diverting water of that river. In *Dugan* Mr. Justice Clark stated, "Rather than a case involving a *general* adjudication * * *, it is a private suit to determine water rights solely between respondent and the United States and the local Reclamation Bureau officials." *State v. Rank, supra*, was affirmed. In it the Court of Appeals had stated:

"The question presented by the contention of the United States requires us to determine whether this suit can be regarded as one 'for the adjudication of rights to the use of water of a river system' within the meaning of § 666.

"(2) There can be little doubt as to the type of suit Congress had in mind. It was not a private dispute between certain water users as to their conflicting rights to the use of waters of a stream system; rather, it was the quasi-public proceeding which in the law of western waters is known as a 'general adjudication' of a stream system: one in which the rights of all claimants on a stream system, as between themselves, are ascertained and officially stated."

Supplementary water adjudications in Colorado throughout the history of the state have been referred to as "general adjudications." The use of the term in *Dugan*, particularly considering the above quoted language of *State v. Rank, supra*, does not bolster the Government's contention. In fairness, it should be stated that counsel for the United States have combined with the term "general adjudication" additional

clauses to the effect "of an entire river system in which all water users are joined." We proceed to the subject of "entire river system" immediately. Later in this opinion, in connection with our discussion of the adequacy of relief to the United States under Colorado law, we will address ourselves to the matter of other parties necessary to the proceeding.

III

RIVER SYSTEM

The Government has stressed repeatedly that an "entire river system" must be involved in order for the McCarran Amendment to be invoked. It urges that District 37 does not embrace an "entire river system." The McCarran Amendment does not contain the word "entire," but rather reads, "adjudication of rights to the use of water of a river system."

An *entire* river system well could mean all of a river and its tributaries above the place of discharge into the ocean. In the case of the Colorado River it would involve water flowing and appropriated in the states of Colorado, Utah, New Mexico, Wyoming, Arizona, Nevada and California. A court of one state cannot adjudicate the rights of ditches diverting water in another state. *Irrigation Co. v. Garvey*, 117 Colo. 109, 184 P. 2d 476. Such an interpretation as urged by the Government would confine the operation of the McCarran Amendment solely to those rivers arising and remaining entirely within the boundaries of one state. Obviously this was and is not the purpose, intent and effect of the Amendment.

It may be that here the United States wished to infer that the McCarran Amendment relates to proceedings in the other western states which have statewide adjudications, but not to Colorado because of its

segmentary water districts. The Little Snake River is in northwestern Colorado. It crosses into Wyoming and after a few miles returns to Colorado, emptying eventually (still in Colorado) into the Yampa River. Under the proposition just mentioned, Wyoming could bring the United States into adjudication of waters appropriated from the small portion of the Little Snake in that state; but Colorado could not do the same as to the much greater portion of the stream within its boundaries.

It is obvious that a state-wide adjudication can be just as fragmentary as that of a water district. At most, the differences are matters of degree. Therefore, we conclude that a proceeding under C.R.S. 1963, 148-9-7 in Water District 37—or any other water district—constitutes an adjudication of rights to the use of water of a *river system* contemplated by the McCarran Amendment. The testimony of the Denver attorney mentioned earlier supports Congressional intent in this respect.

With respect to the Government's argument that the same river may flow through more than one water district, attention is directed to *Ft. Lyon Canal v. Arkansas Valley S. B. & I. L. Co.*, 39 Colo. 332, 90 P. 1023. It was there said:

“Ample provision is made for the protection of the rights of parties to proceedings in the same district, but none of the provisions relating to this class relate to appropriators in different districts, as between each other. As to these, it was necessary for the orderly distribution of water, that the decrees in the different districts should be *prima facie* binding, but in order to protect their rights, as between each other, a period was given within which actions might be instituted to settle and adjust such rights. For this purpose, §§ 2434 and 2435

[Mills' Ann. Stats.] were enacted. Thereby opportunity was afforded to adjust such rights by an independent action, but, wisely, the period within which such an action could be commenced was prescribed; otherwise, rights as between appropriators of water in different districts where rights have been adjudicated, under the statutory proceedings, would remain unsettled indefinitely."

The provisions of §§ 2434 and 2435 as mentioned are the same as C.R.S. 1963, 148-9-17. With this correlation between districts under our statutes and with the creation of a division for each river by the 1969 amendment (C.R.S. 1963, 148-21-1 *et seq.*), the same practical result can be obtained in adjudication of rights under Colorado statutes as under the statewide systems of other states.

IV

APPROACH TO THE ADJUDICATION OF WATER RIGHTS OF THE UNITED STATES

The remainder of the propositions asserted by the Government (as outlined early in this opinion) might be characterized as follows: If the state court of Colorado has jurisdiction over the United States, how and why can it grant the relief the United States would desire with respect to its water rights? In oral argument counsel for the Government indicated if there were a satisfactory answer to that question, the United States might not be so loathe to submit itself to the jurisdiction of our state courts. He also gave the distinct impression that he would be most surprised if we produced a ruling which would overcome the trepidation of the Justice Department to see federal water rights under the state jurisdiction.

Whether or not we mitigate the sovereign reluctance, we hold that under its plenary power a Colorado district court can make the relative rights of the United States a subject of its decree and can bring under its jurisdiction additional necessary parties in order to make such a decree fully valid, effective and enforceable. Before elaborating on this declaration, we deem it advisable to discuss some of the features and problems involved—or perhaps to be involved—in any decretory approach to the water rights of the United States in Colorado, which must be confronted someday whether in our state courts or in a federal forum.

In the district court the United States filed a memorandum supporting its motion to dismiss. It there made the following statement concerning its claims to the use of water:

“The United States claims water rights in Water District 37 which have never been the subject of an adjudication proceeding. These rights are under the administration of the Department of Agriculture. These rights claimed by the United States are rights with a date of reservation earlier than priorities granted in previous adjudications in Water District No. 37. To be specific:

“The United States will claim those rights to use the waters within Colorado Water District 37 (primarily the Eagle River and its tributaries) by reason of the withdrawal of public lands within Water District 37 and the reservation thereof as National Forest lands. Said withdrawal was made by Presidential Proclamation of August 25, 1905 (34 Stat. 3144), and the United States claims those waters that it may now or in the future require for the purpose of said withdrawal with a priority of August 25, 1905.

"In addition to our general reserved right, the United States will claim various specific uses, as follows:

"(a) 39 specific uses upon the above said withdrawn lands for which the United States has made filings with the State Engineer. The dates of these filings run from 5/18/1939 to 3/1/1965. The United States will, however, claim the date of reservation, 8/25/1905.

"(b) 185 specific uses upon the above said withdrawn lands for which the United States has made no filing with the State Engineer. Of the uses, 68 are current uses and 117 are foreseeable uses. The United States will claim the date of reservation, 8/25/1905.

"(c) 10 C.F.S. for the Minturn Ranger Station Ditch, diverted from the Eagle River at a point on the right bank of the river whence the northwest corner of the SW $\frac{1}{4}$ of Sec. 36, T. 5 S., R. 81 W., 6th P.M. bears S $87^{\circ} 25'W$, a distance of 1982 feet. The date of appropriation is September 16, 1941. The water is used for irrigation, watering, and fire protection.

"(d) 1 C.F.S. for Nelson Ditch diverted from the Eagle River at a point on the south bank of the river, whence the northwest corner of the SW $\frac{1}{4}$ of Sec. 36, T. 5 S., R. 81 W., 6th P.M. bears S $75^{\circ} 31'W$, a distance of 1337.1 feet. The date of appropriation is May 28, 1902. The water is used for irrigation and stock watering.

"(e) Additional specific uses may be claimed. For example, at the moment the Department of Agriculture is investigating the general reserved right and six specific uses on an area acquired from the Department of Defense and known as Camp Hale. The reservation and priority dates have not been determined at this time."

In its application here, the United States makes the statement, "The court had no jurisdiction to adjudicate rights other than those arising under Colorado law, but the United States claims rights otherwise arising." We are not sure whether by this statement the United States asserts that none of its rights have arisen under Colorado law. For the purpose of our discussion we will assume that it claims both (a) water rights reserved in connection with the withdrawal of public lands and which it asserts have not arisen under Colorado law and (b) appropriations arising under Colorado law (such as possibly may be the case as to water diverted by the Nelson Ditch mentioned in its memorandum).

V

RESERVED RIGHTS

The Government insists that our district courts have jurisdiction only to adjudicate rights under the doctrine of appropriation and, therefore, they do not have jurisdiction over the so-called reserved water of the United States. It advises us that such reserved rights are valid with priorities substantially antedating several of the supplementary decrees in Water District 37 under the authority of *Arizona v. California*, 373 U.S. 546, 83 S. Ct. 1468, 10 L. Ed. 2d 542; *Federal Power Commission v. Oregon*, 349 U.S. 435, 75 S. Ct. 832, 99 L. Ed. 1215; *Winters v. United States*, 207 U.S. 564, 28 S. Ct. 207, 52 L. Ed. 340; *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690, 19 S. Ct. 770, 43 L. Ed. 1136.

In contrast, counsel for the intervenor Central Colorado Water Conservancy District contend that the United States has no rights whatsoever except any that it might have acquired in the same manner as

an individual. In support of this they cite Article XVI, §§ 5 and 6 of the Colorado constitution and *Stockman v. Leddy*, 55 Colo. 24, 129 P. 220. These sections were placed in the constitution at the time it was prepared under the enabling act of Congress. Section 5 and a portion of Section 6 read as follows:

“Section 5. Water of streams public property.—The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.

“Section 6. Diverting unappropriated water—priority preferred uses.—The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. * * *

In *Stockman* this court stated:

“This constitution of ours was ratified and adopted by the legal voters of the state in accordance with the conditions prescribed by the enabling act of congress, and the president of the United States in his proclamation admitting Colorado into the Union found the fact to be that the fundamental conditions imposed by congress on the State of Colorado to entitle it to such admission had been complied with. Congress, in passing the enabling act, and the President, in issuing his proclamation, were aware of the existing physical conditions and of the topography and geography of the state. The federal government, by its lawmaking and executive bodies, knew that the natural streams of this state are, in fact, nonnavigable within its territorial limits, and practically all of them have their sources within its own boundaries, and that no stream of any importance whose source is without those boundaries, flows into or through this state. The entire volume of

these streams is therefore made up of rains and snows that fall upon the surface of lands included within the exterior lines of this state and of springs which issue from the earth within the same area. Such being the peculiar conditions, the state was justified in asserting its ownership of all the natural streams within its boundaries. When Colorado was admitted into the Union with such a constitution, the federal government, through its lawmaking and executive departments, thereby recognized and confirmed such right of ownership as belonging to the state in its sovereign capacity. We therefore find it to be not only that our state constitution and pertinent statutes, but the decisions of the courts and duly announced public policy, all are in accord on the proposition to which the federal government has, as we have just shown, given its consent that the waters of the natural streams of this state belong to the people, to the state, in its sovereign capacity, and that its right to their distribution and control within its borders is free from any interference by any other sovereignty."

The authorities cited by the United States are not directly in point so far as its rights in Colorado are concerned. *Arizona v. California, supra*, involves claims of the United States on behalf of Indian reservations and other withdrawn lands, most if not all of which were created or withdrawn prior to the time Arizona was admitted into the Union in 1912. Furthermore, Arizona has never had a provision in its constitution declaring proprietorship of water as does the Colorado constitution. In *Arizona v. California* it was said:

"Arizona's contention that the Federal Government had no power, after Arizona became a State, to reserve waters for the use and bene-

fit of federally reserved lands rests largely upon statements in *Pollard's Lessee v. Hagan*, 3 How. 212, 11 L.Ed. 565 (1845), and *Shively v. Bowlby*, 152 U.S. 1, 14 S. Ct. 548, 38 L.Ed. 331 (1894). Those cases and others that followed them gave rise to the doctrine that lands underlying navigable waters within territory acquired by the Government are held in trust for future States and that title to such lands is automatically vested in the States upon admission to the Union. But those cases involved only the shores of and lands beneath navigable waters. They do not determine the problem before us and cannot be accepted as limiting the broad powers of the United States to regulate navigable waters under the Commerce Clause and to regulate government lands under Art. IV, § 3, of the Constitution. We have no doubt about the power of the United States under these clauses to reserve water rights for its reservations and its property."

Certainly this is not authority to refute the contention that, by reason of the provisions of Colorado's constitution as originally adopted, the United States surrendered its right in the future to reserve water.

In *Federal Power Commission v. Oregon*, *supra*, the Commission had issued to a power company a license to construct a hydro-electric plant, including a dam across a navigable stream. The dam was to be located in part upon an Indian reservation and the remainder upon lands long before withdrawn for power purposes. The project did not involve any permanent diversion of water as the entire flow of the river would run through or over the dam into the natural bed of the stream. It was held that the Federal Power Act was applicable to the license and a license from the state was not necessary. Again, this case is not direct authority for the answer sought here in Colorado.

Winters v. United States, supra, involved water for an Indian reservation reserved prior to the admission of Montana into the Union. It was argued that the subsequent admission of Montana into the Union "upon an equal footing with the original States" (25 Stat. 676) repealed the reservation of water. This argument was not accepted. We are not concerned here with water rights asserted by the United States prior to Colorado's admission into the Union.

The *United States v. Rio Grande Dam & Irrig. Co., supra*, involved acts within the Territory of New Mexico prior to the time New Mexico became a state. It was there stated:

"Although this power of changing the common law rule as to streams within its dominion undoubtedly belongs to each State, yet two limitations must be recognized: First, that in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property. Second, that it is limited by the superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States."

Here, instead, we are dealing with a non-navigable stream and instead of having an "absence of specific authority from Congress," the question is what was the specific authority from the United States in its recognition of the Colorado constitution.

"In sharp contrast, however, stand federal rights under the reservation doctrines, which are the subject of mystery, whose true nature can be unveiled only through the search of the few obscure instances wherein they have been

adjudicated." The foregoing is from the study submitted to Public Land Law Review Commission, *supra*, P. S-13.

We are not determining whether the United States has reserved water rights in connection with lands withdrawn subsequent to August 1, 1876, the date of Colorado's admission to the Union; nor, if so, whether these rights have priority over previously adjudicated rights. These questions properly should be decided after the United States presents its specific claims for adjudication and the issues of fact and law are clearly drawn. We do say at this time that, except for *Stockman v. Leddy, supra*, we have not encountered any decision determinative as to whether the United States has reserved water rights in Colorado; and we postpone the consideration of whether *Stockman* is to be overruled, as perhaps it must be if the contentions of the United States as to its reserved water rights are found to be sound.

VI

WATER APPROPRIATIONS OF THE UNITED STATES UNDER STATE LAW

As already mentioned, the United States has not been a party in any previous general adjudication in District 37. In its brief the Government cites Colorado statutes and our decisions under which decrees in water adjudications cannot be attacked after four years and in a subsequent water adjudication a priority cannot be given to a use of water prior to the date of the last adjudicated decree. It quotes from *Arizona v. California*, 298 U.S. 558, 56 S. Ct. 848, 80 L. Ed. 1331, that "no decree rendered in its absence can bind or affect the United States * * *." The brief continues:

"It is self-evident that supplemental water adjudications are not actions to which the United States has consented. It would be absurd to hold that the United States is bound by prior adjudications to which it was not a party and is thus now bound by proceedings in which it cannot have its rights adjudicated. Such a holding would convert 43 U.S.C. Sec. 666 into an instrument of injustice that would destroy the rights of the United States. It is for this reason that 43 U.S.C. Sec. 666 consents only to an adjudication in which all the rights of all users are before the court."

The quoted language in *Arizona v. California* was not made in connection with an adjudication of water rights by a state court and here again we are going to wait until the matter is argued more fully and specifically before making a determination as to whether this applies to Colorado water adjudications. Offhand, we are inclined to believe that it does apply. In *Irrigation Co. v. Garvey*, 117 Colo. 109, 184 P. 2d 476 there was involved water appropriated in Utah from Rock Creek, which arises in Utah, flows into Colorado, and then returns to Utah. The question was whether Utah users were bound by a Colorado adjudicative decree more than four years old. This court held that they were not and in this opinion Mr. Justice Stone wrote:

"However, the decree can speak only as to matters within the jurisdiction of the court, and where the court in such a statutory proceeding attempts to determine matters beyond its competence, its decree, as to such matters, is not conclusive. 'If the court lacks jurisdiction to render, or exceeds its jurisdiction in rendering, the particular judgment in the particular case, such judgment is subject to collateral attack, even though the court had juris-

diction of the parties and of the subject matter.' *People ex rel. v. Burke*, 72 Colo. 486, 212 Pac. 837. So where the court by its decree attempted to adjudicate the ownership of the water, it was held that, 'In so far as this decree purports to settle and fix relative rights of individual users and consumers of water through said ditch, it is ineffectual.' *Rollins v. Fearnley*, 45 Colo. 319, 101 Pac. 345. And, to the extent a decree is beyond the authority of the court, it cannot be made valid by any rule of *res judicata* or any statutes of limitation. It is no more effectual after four years, than before."

It well may be that the same principle should be applied to appropriations made by the United States which have not been included in previous adjudications to which the United States was not a party.

VII

JURISDICTION OVER THE WATER CLAIMS OF THE UNITED STATES

We now return to the proposition asserted earlier that the United States can obtain in a supplementary water adjudication in Colorado an adequate judicial determination of its rights and relative priorities. For the purpose of our holding in this respect we make the following three assumptions *arguendo*: (1) The United States has reserved water rights in Water District 37 initiated prior to more recent general adjudication decrees in that district; (2) The United States has acquired rights to the use of water under Colorado law and such rights were initiated prior to the decrees just mentioned; and (3) The United States is entitled to a decree that its rights to the use of water are the same as if each of those rights had been awarded priorities in a water adjudication next following the initiation of

the right. We repeat—these are assumptions *arguendo*—not determinations.

Water rights in Colorado are of the greatest importance to the welfare and economy of the people of this state, and of considerable importance to the United States. There are about 2,700,000 acres of land under irrigation in Colorado. Of the 66½ million acres of land in Colorado, the United States has 36.4%—or about 24½ million acres—in the form of public domain, national forests, national parks and monuments, military reservations and an Indian reservation.

We have a situation in which the federal sovereign claims water rights which are nowhere formally listed, which are not the subject of any decree or permit and which, therefore, are etheric in large part to the person who has reason to know and evaluate the extent of his priorities to the use of water. To have these federal rights in a state of uncorrelated mystery is frustrating and completely contrary to orderly procedure—and this is equally true from the standpoint of the United States as well as Colorado and its citizenry. The fact that our statutes do not provide for the adjudication of the rights of the United States with priorities prior to the dates of later decrees does not mean that our district courts in a water adjudication cannot determine the rights of the United States in relation to decreed water rights. On the contrary, our district courts have that jurisdiction. "The district courts shall be trial courts of record with general jurisdiction, and shall have original jurisdiction in all civil, probate and criminal cases, except as otherwise provided herein * * *." Colo. Const. art. VI, § 9(1). We hold that the Constitution, without the need of any statute, grants jurisdiction of the subject matter under consideration.

The following remarks of Professor Karl N. Llewellyn are apt in this situation:

"But a court must strive to make sense *as a whole* out of our law *as a whole*. It must, to use Frank's figure, take the music of any statute as written by the legislature; it must take the text of the play as written by the legislature. But there are many ways to play that music, to play that play, and a court's duty is to play it well, and in harmony with the other music of the legal system." Llewellyn "Remarks on the Theory of Appellate Decision" etc., 3 Vanderbilt L. Rev. 395.

Moreover, there are statutes which appear to recognize this jurisdiction which we hold is plenary:

"For the purpose of hearing, adjudicating and settling all questions concerning the priority of appropriation of water between owners and claimants of water rights drawing water from the same source within the same water district, and all other questions of law and questions of right growing out of, or in any way involved or connected therewith, jurisdiction is hereby vested exclusively in the district court of the county in which said water district exists * * *." C.R.S. 1963, 148-9-2.

"It is hereby declared to be the policy of the state of Colorado that all waters originating in or flowing into this state, whether found on the surface or underground, have always been and are hereby declared to be the property of the public, dedicated to the use of the people of the state, subject to appropriation and use in accordance with law. As incident thereto, it shall be the policy of this state to integrate the appropriation, use and administration of underground water tributary to a stream with the use of surface water, in such a way as to maximize the beneficial use of all of the waters of this state." C.R.S. 1963, 148-21-2(1) being the

Water Right Determination and Administration Act of 1969.

For the reasons already expressed as to the promotion of orderly procedure, we hold that it was the purpose and intent of the McCarran Amendment that it be used to obtain jurisdiction over the United States with respect to its reserved water rights. Of particular significance was the letter of the Acting Assistant Secretary of the Interior to the Chairman of the Committee on the Judiciary as to the McCarran Amendment under date of August 3, 1951. This is made a part of the Committee's Report mentioned earlier on pages 7 and 8. Senate Calendar No. 711, *supra*. A portion of the letter reads:

"The interests of the United States in the use of the waters of its river systems are so many and so varied that a full enumeration of them could not be made without a great deal of careful study. It is enough, I hope, for present purposes to exemplify these interests by pointing to those which it has under the commerce clauses of the Constitution; those which exist by virtue of the creation of Indian reservations under the doctrine of *United States v. Winters* (207 U.S. 564 (1908)) or by virtue of the creation of, for instance, a national park; those which it has asserted by entering into international treaties; those which it may have by virtue of its present and prior ownership of the public domain and which have not vested under the acts of July 26, 1866 (14 Stat. 253, 43 U.S.C. 661), July 9, 1870 (16 Stat. 218, 43 U.S.C. 661), and March 3, 1877 (19 Stat. 377, 43 U.S.C. 321); those with respect to which its officers and employees have followed the procedure prescribed in section 8 of the act of June 17, 1902 (32 Stat. 388, 43 U.S.C. 383); and those which it has acquired by purchase, gift, or condemnation from private owners. Since the United States can be said, with

varying degrees of accuracy, to be the 'owner' of rights of any or all these types, it is clear to me that enactment of the bill could lead to a tremendous volume of unwarranted litigation and, in the absence of a complete and detailed catalogue of all the rights and interests which the United States has in the stream systems of the Nation, to the hazard that, by overlooking some, it would be forever precluded from asserting them thereafter."

See also the discussions in 19 Stan. L. Rev. 65, *et seq.*; 20 Stan. L. Rev. 1187, *et seq.* and the Study submitted to the Public Land Law Commission, pp. 189-195, mentioned above. We are holding here that whatever rights the United States has to water can be recognized and adjudicated by our district courts just as adequately as in any other forum—and perhaps more adequately. Therefore, it would seem that no adequate reason exists to withhold reserved rights from the light of day and adjudication.

VIII

NOTICE

In its appearance before the district court the City and County of Denver moved for an order providing for the notification of all appropriators in Water District 37 in order that the priorities of the United States' claims to water might be adjudicated. It filed a brief supporting its belief that the court can do this under the portion of C.R.S. 1963, 148-9-7 which reads, "if the proceeding be supplemental as to one class of rights, for example, irrigation, and original as to another class, for example nonirrigation, the service shall be necessary on those whose rights have already been adjudicated." The claims of the United States, says Denver, is another class of rights under that statute.

The United States and most of the other parties here disagree. As we hold that the district court has jurisdiction by reason of its plenary powers, it follows that the court need not have a statutory provision for notice. After the United States has filed its statements of claim in the district court, including the priority dates it seeks, the court then can determine which claimants of adjudicated rights need be given notice and can specify the manner that notice shall be given. Obviously, notice should be directed to those who might be adversely affected if the prayers for relief of the United States were granted.

Undoubtedly it would be preferable to have a statute setting forth the manner of notice in the circumstances under consideration, and it well may be that legislation in other respects might be helpful in implementing the jurisdiction of our courts over the United States. But although desirable, legislation is not necessary to implement the adjudication of rights under this opinion nor to protect the rights of all parties who may be involved, including the United States.

IX

WATER RIGHT DETERMINATION AND ADMINISTRATION ACT OF 1969

Senate Bill 81 adopted in 1969 (C.R.S. 1963, 148-21-1 *et seq.*) was approved after the briefs were filed in this proceeding and prior to oral argument. Following oral argument the United States and the City and County of Denver filed supplemental briefs on the subject of the effect of this Act upon the questions involved, if any. Since the district court did not have this matter before it, we deem it the better part of wisdom to await its determination with respect to this

matter. We do make the observation that some or all of the parties in Water District 37, as well as in similar proceedings in other parts of the state which have been held in abeyance awaiting this opinion, may conclude that the provisions of the 1969 Act are more suitable than the pre-existing statutes for adjudications involving the United States.

Rule discharged.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF COLORADO

No. 23819
(Original proceeding)

THE UNITED STATES OF AMERICA, PETITIONER
vs.

THE DISTRICT COURT IN AND FOR THE COUNTY OF
EAGLE AND STATE OF COLORADO AND THE JUDGE
THEREOF, THE HONORABLE HAROLD A. GRANT,
RESPONDENTS

THE COLORADO RIVER WATER CONSERVATION DISTRICT,
CITY AND COUNTY OF DENVER, ACTING BY AND
THROUGH ITS BOARD OF WATER COMMISSIONERS,
CENTRAL COLORADO WATER CONSERVANCY DISTRICT,
AND THE NEW JERSEY ZINC COMPANY, INTER-
VENORS

On consideration of the pleadings and arguments
herein, it is hereby ordered that the rule to show cause
heretofore issued in this action be, and it hereby is,
discharged.

By the Court. September 15, 1969.

Supreme Court, State of Colorado. Certified to be
a full, true and correct copy October 1, 1969.

(Court Seal)

RICHARD D. TURELLI,
Clerk of the Supreme Court.

By FLORENCE WALSH,
Deputy Clerk.